Practice Notes

1. CUSTODY AND RELIGION

An application was made in the Chancery Court by a father for the custody of his children and a declaration and order that the children should be brought up in a particular religious faith.

By agreement of Counsel a consent order was drawn up in the following form:

"In the Supreme Court
Chancery Division

In the matter of S, S and S, Infants under the age of 21 years

THE COURT DOES HEREBY DECLARE that S, S and S ought to be brought up in the communion, doctrines and worship of the ..... Church, and that the said infants ought to attend public worship of the said Church.

AND IT IS ORDERED that the said (mother) be restrained and she is hereby restrained from instructing the said infants, or any of them, or causing, procuring or permitting them or any of them to be instructed in any religious doctrines, otherwise than according to the rites, ceremonies and doctrines of the ..... Church."

per Harrison J.

Teed & Teed, Solicitor for the Petitioner (husband and father).
B. R. Guss, Q.C., Solicitor for the wife and mother.

2. Order 31A — DISCOVERY

When an action is instituted against the councillors of a Municipal Corporation, as distinct from the Corporation itself, the employees of the Corporation cannot be examined for discovery as employees of the councillors.

When a party has filed his pleadings, he is then entitled to examination for discovery of a party adverse in interest. A party who has not filed his pleadings cannot resist examination, if the opposite party has complied with the rules of practice, insofar as he is able.

Andrew E. Bruce et al v. Ernest W. Patterson et al per Michaud CJQB.

J. Paul Barry, Q.C., Solicitor for the Plaintiffs.
Teed & Teed, Solicitor for Defendants Whitebone, Teed and MacCallum.
G. E. McInerney, Solicitor for Defendants Patterso nand Campbell.
Nave George, Solicitor for Defendant Belyea.
W. A. Gibbon, Solicitor for Defendant Harrigan.

3. Order 13 Rule 10 Order 27 Rule 15 – SETTING ASIDE A JUDGMENT OBTAINED IN DEFAULT OF APPEARANCE OF DEFENCE

Interlocutory Judgment was signed and the defendant applied to have the judgment set aside and to be allowed to defend. Sufficient grounds having been shown to indicate there could be a defence on the merits, the judgment was set aside on the terms that the defendant pay the plaintiff the plaintiff's costs of the interlocutory judgment and the application to set the judgment aside within 20 days. The costs were taxed and allowed by the Judge at the time of making the order setting aside the judgment.

Alfred B. Mollins v. Benjamin W. Guthrie per Bridges J.
Teed, Palmer, O'Connell & Hanington, Plaintiff's Solicitor.
William G. Power, Defendant's Solicitor.

In an application to set aside a default judgment on two grounds: (a) that the judgment was irregular, being obtained in contravention of Order 3, Rule 6, and (b) that the defendant was entitled to defend on the merits, Anglin J. stated in the course of a written judgment:

> "I would think that if a judge is to decide whether a defendant should be allowed to defend on the merits he should be given the facts upon which he may make such a decision."

The James Robertson Company (Limited) v. Thomas S. Stephen per Anglin J.
Teed, Palmer, O'Connell & Hanington, Plaintiff's Solicitor.
George & Tippett, Defendant's Solicitor.

In an application to set aside a judgment obtained in default of appearance, it was argued that no merits were disclosed in the defendant's affidavit. Held, sufficient matters were set out to indicate there might be a defence and the application was allowed.

Cortland O. Wetmore v. The Provincial Bank of Canada per Anglin J.
Teed & Teed, Plaintiff's Solicitor.
Gibbon & Harrigan, Defendant's Solicitor.

4. Order 13 Rule 10 – County Courts Act Sec. 63.

In an application to set aside a default judgment in the County Court it was argued that (a) the Court had no jurisdiction under the wording of s. 63 of the County Courts Act, (b) that under the circumstances the judgment should not be set aside, (c) that costs should be given if the judgment were set aside, (d) that security be one of the terms of setting aside the judgment.

It was held: (a) the Court had jurisdiction to set aside the judgment; (b) that the defendants pay to the plaintiff costs of $100.00.

per Keirstead Co. Ct. J.

Rodney P. Adair v. Fraser-Brace Terminal Constructors
Teed, Palmer, O'Connell & Hanington, Solicitor for Plaintiff.
Ritchie, McKelvey & Mackay, Solicitor for Defendants.

5. Sec. 28 County Courts Act – SERVICE OF WRIT

Section 28 of the County Courts Act provides that service of a process may be made at the known place of abode of the defendant upon an adult member or inmate of his family, if the defendant be within the province.

Held, service of a write of summons upon the mother of the defandant to be good service, where the affidavit of service stated the mother to be an adult member of the defendant's family. An order perfecting service was accordingly made.

E. M. McBriarty v. Leonard McCullough per Keirstead Co. Ct. J.
J. Paul Barry, Q.C., Plaintiff's Solicitor.

Service upon the defendant at his home by delivering a copy of the writ to M.C., an inmate of the household where the defendant resides, the defendant being within the limits of the Province was held not to be sufficient to comply with s. 28 of the County Courts Act.

M. R. A. Ltd. v. Wallace Berry
B. R. Guss, Q. C., Plaintiff's Solicitor.

Where the affidavit of service stated that the writ was served upon the housekeeper of the defendant, an adult person residing in the house of the defendant and known to the deponent as a member or inmate of the defendant's family, an order was granted perfecting service.

MacKay Forest Products Limited v. Harold Cox per Keirstead Co. Ct. J.
Inches & Hazen, Plaintiff's Solicitor.

Service of a writ upon an adult person residing at the residence and usual place of abode of the defendant is not sufficient service and an order will not be granted perfecting service.

Muriel Edith Ferris v. Ronald E. Moss per Clerk.
Gilbert, McGloan & Gillis, Plaintiff's Solicitor.

6. PERFECTING SERVICE AFTER APPEARANCE, DEFENCE & COUNTERCLAIM

Where a party has entered an appearance and served a statement of defence and counterclaim, an order will be granted perfecting service, although the writ was only served upon an adult residing at the place of residence of the party.

Muriel Edith Ferris v. Ronald E. Moss per Keirstead Co. Ct. J.
Gilbert, McGloan & Gillis, Plaintiff's Solicitor.

7. COUNTY COURT COSTS – CLAIM WITHIN THE JURISDICTION OF MAGISTRATE – Sec. 73 COUNTY COURTS ACT

The plaintiff by affidavit showed that the distance between the residence of the defendant and the head office of the plaintiff was 321 miles, that an action brought in a Magistrate's Court might require the attendance of a witness, and the witness fees with mileage would amount to $48.15, that the plaintiff wished to have a County Court judgment to bind any lands which the defendant may or might own.

Held sufficient grounds upon which to certify that County Court costs be allowed.

Commercial Equipment Limited v. George Mazerolle per Keirstead Co. Ct. J.

K. P. Lawton, Solicitor for Plaintiff.

8. CRIMINAL APPEAL CRIMINAL CODE SEC. 750

Upon an appeal from a summary conviction under the provisions of s. 750 of the Criminal Code, service of the notice of appeal upon the convicting Magistrate and the informant is compliance with s. 750 (b). The respondent means the informant and the Crown need not be served.

R v. Hannah per Keirstead Co. Ct. J.

E. L. Teed, for the Crown

J. Paul Barry, Q.C., for the Defendant.

9. INTOXICATING LIQUOR ACT – SEC. 130-131

Where the requirements of s. 130 of the Intoxicating Liquor Act are not complied with as to service of notice of appeal, the Court has no jurisdiction to issue a summons in the appeal, under s. 131.

Arthur Dickson v. The Queen per Keirstead Co. Ct. J.

Ervin O'Brien for the Appellant.

Eric L. Teed

Saint John, N. B.